TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~221~~ 30.

C. H. NICHOLS LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES FRANSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED MAY 31, 1905.

(19,783.)

(19,783.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 281.

C. H. NICHOLS LUMBER COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES FRANSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1906.

a In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON, Plaintiff (Defendant in Error),
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant (Plaintiff in Error).

Return to Writ of Error.

On Error from the Circuit Court of the United States for the Western District of Washington, Northern Division, to the Supreme Court of the United States.

1 In the United States Circuit Court, Ninth Circuit, District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON, Plaintiff,
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff complains and alleges:

I.

That the above named defendant now is and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and doing business in the state of Washington, and the owner of a certain shingle mill at Kingstone, Kitsap County, Washington, together with all machinery, tools and appliances thereunto belonging, including the cut-off rig or table hereinafter mentioned, and engaged in operating the same in the manufacture of shingles. That the plaintiff now is and for more than one year last past has been a resident of Washington, and a citizen of Sweden.

II.

That in defendant's said mill, at the time hereinafter mentioned, was a certain circular saw called a cut-off saw and a movable table hanging by three pieces of timber fastened to a stationary timber above the saw. That said movable or swinging table extended on both sides of the saw, and the saw and table *is* operated by the operator, called a cut-off sawyer, placing the timber, called a shingle bolt,

upon the table, then taking hold of a certain handle in the
2 table for that purpose with his left hand and placing his right hand upon the shingle bolt to keep it steady, the table with the bolt upon it is pressed by the sawyer back to the saw and the saw cuts through the timber until cut off.

III.

That on the 31st day of August, 1904, the plaintiff was hired by the defendant as a cut-off sawyer in said mill, and directed to use the said table or rig in his employment. That in order to safely operate such table or rig it is necessary that the same is well made of sound timbers and well braced, solid and steady so that it will not shake, jar or tremble while in use; that if such table is weak, shaking and unsteady it is liable to cause the saw to pinch in the timber thereby turning or twisting it and throwing it off the table or rig.

IV.

That the said table or rig in defendant's mill was old, worn, trembling and shakey, and the bolts and braces loose, and the planks and timbers of which it was made were old and rotten, causing it to shake and vibrate while in operation, and by reason thereof dangerous to operate; that said defendant was well aware and fully informed of the unsafe and dangerous, old and rotten and defective condition of said table or rig at the time the injury hereinafter complained of was received by the plaintiff and for a long time prior thereto, and defendant was guilty of negligence in allowing the said table or rig to become old, worn and shakey and the planks and timbers in the same rotten and the bolts and braces loose without replacing the same and without repairing the same.

V.

That on the first day that plaintiff worked with said table or rig
he discovered partly its defective and dangerous condition
3 and spoke to defendant's superintendent and mill foreman and called their attention to such defective and dangerous condition and requested that the same be repaired, as otherwise he would not continue to use the same. That thereupon both the said superintendent and mill foreman, who had full charge of the installation, alterations and repairs of all machinery, tools and appliances in said mill, requested the plaintiff to continue the use of said table or rig for a short time until the same could be replaced by a new table or rig, and promised plaintiff that a new table or rig would be installed and the rotten and defective table or rig removed, as soon as the new one could be made, which would take about a week's time.

VI.

That the plaintiff believing and relying upon said promise to repair or replace said table or rig, and believing that by the use of

great care it could be safely used for a short time until it could be replaced or repaired he continued to use the same for a period of six days; that the plaintiff did not know the full extent of the defect in the table or rig for the reason that part of the timbers which had rotted away was hidden and concealed behind and under timbers apparently sound.

VII.

That on the 6th day of September, at about 10 o'clock in the forenoon, while the plaintiff was working as such cut-off sawyer and using said table or rig, and while a shingle bolt was being cut, and while using great care and without any fault or negligence on his part, the said table or rig, by reason of said defects set forth in paragraph four hereof shook and vibrated causing the saw to pinch in the cut thereby violently twisting the bolt and throwing it off the table, and by so doing caused plaintiff's right hand by which
4 he was holding the bolt or timber, to be thrown against the saw thereby severly injuring it as hereinafter stated.

VIII.

That the injuries sustained by the plaintiff *is* as follows: The bones, muscles, joints and knuckles of his right hand where the fingers are joined to the hand were cut thereby rendering the fingers of said hand permanently useless and preventing him from using it in any employment, and causing the plaintiff great pain and rendering him maimed, crippled and disfigured. That at the time of the injury the plaintiff was 24 years of age a strong and able bodied man, and a cut-off sawyer by trade, and able to earn and earning at said time at his trade $3.50 per day, which he would have so continued to earn for a period of 39.49 years, but by reason of said injury he will be permanently prevented from using his hand in any manual labor and from following his trade by which alone he is able to earn a livelihood, to his damage in the sum of $25475.00; that by reason of said injury the plaintiff has suffered and will continue to suffer great pain and forever remain crippled and maimed to his damage in the sum of $1000.00 and that by reason of the premises the plaintiff has been injured in the sum of $26475.00.

Wherefore, plaintiff demands judgment against the defendant in the sum of $26475.00 and costs of suit.

MARTIN J. LUND,
Attorney for Plaintiff.

5 STATE OF WASHINGTON, *County of King, ss:*

Charles Franson, being first duly sworn, says that he is the plaintiff in the above entitled action, that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

CHAS. FRANSON.

Subscribed and sworn to before me this 29th day of September, 1904.

[NOTARIAL SEAL.] MARTIN J. LUND,
Notary Public in and for the State of Washington, Residing at Seattle.

Indorsed: Complaint. Filed in the U. S. Circuit Court Dist. of Washington Oct. 3 1904. A. Reeves Ayres, Clerk, H. M. Walthew, Dep.

6 In the United States Circuit Court, Ninth Circuit, District of Washington, Northern Division.

CHARLES FRANSON, Plaintiff,
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Answer.

Comes now the above named defendant and for answer to the complaint of the plaintiff herein alleges:

I.

Referring to paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of said complaint, this plaintiff denies the same and each and every allegation thereof, excepting as hereinafter admitted, and expressly denies that plaintiff was injured in the sum of twenty-six thousand four hundred seventy-five ($26,475.00) dollars, or in any sum whatsoever by reason of the matters and things set forth in said complaint.

II.

Defendant admits that it is and was a corporation organized under the laws of the State of Wisconsin, and doing business in the State of Washington. It admits that plaintiff had his hand injured in some manner at or about the time mentioned in said complaint.

For a further and affirmative defense defendant alleges:

I.

That defendant was not in any way guilty of any negligence which caused or contributed to the cause of plaintiff's injury; that said injury to plaintiff was caused by his own negligence and if there was any negligence of any other person contributing to
7 the cause of said injury it was the negligence of a fellow servant; that the plaintiff was thoroughly acquainted with the condition of the saws and all appliances connected therewith and with all of the premises where he was working and thoroughly knew of and understood the dangers appertaining thereto, and particularly the dangers which occasioned his injury and the risk of all said dangers was assumed by him in his employment.

Wherefore defendant prays that this action be dismissed and that it go hence without day with its costs.

ROOT, PALMER & BROWN AND
DOUGLAS, LANE & DOUGLAS,
Attorneys for Defendant.

STATE OF WASHINGTON, *County of King, ss:*

J. F. Douglas, being first duly sworn, on his oath says:

That he is one of the attorneys for the defendant named in the foregoing answer; that he has heard the same read, knows the contents thereof and believes the same to be true. That the reason this verification is not made by one of the officers or agents of the defendant is that none of the officers or agents of the defendant are within said county of King and all are absent therefrom, in which said county affiant does reside and has his office.

J. F. DOUGLAS.

Subscribed and sworn to before me this 24 day of October, 1904.

JAMES H. DOUGLAS,
[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

8 Due service of the enclosed Answer admitted and a true copy received this 24 day of October, 1904.

M. J. LUND,
Attorneys for Pl'ff.

Indorsed: Answer. Filed in the U. S. Circuit Court Dist. of Washington Nov. 2 1904. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

9 In the United States Circuit Court, Ninth Circuit, District of Washington, Northern Division.

CHARLES FRANSON, Plaintiff,
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Reply.

Comes now the plaintiff in the above entitled cause and for reply to the affirmative defense contained in defendant's answer herein says:

I.

Plaintiff denies each and every allegation contained in paragraph one of said affirmative defense.

Wherefore plaintiff demand- judgment as in his complaint herein.

MARTIN J. LUND,
Attorney for Plaintiff.

UNITED STATES OF AMERICA, *District of Washington, ss:*

Charles Franson, being first duly sworn upon oath deposes and says, that he is the plaintiff herein, that he has heard the foregoing reply read, knows the contents thereof and believes the same to be true.

CHAS. FRANSON.

Subscribed and sworn to before me this 29th day of October, 1904.

MARTIN J. LUND,

[NOTARIAL SEAL.] *Notary Public in and for the State of Washington, Residing at Seattle.*

Receipt of a copy and due service hereof admitted this 29th day of Oct. 1904.

ROOT, PALMER & BROWN,
Attorney- for Def.

Indorsed: Reply. Filed in the U. S. Circuit court Dist. of Washington Oct. 31 1904. A. Reeves Ayres, Clerk, H. M. Walthew, Dep.

10 In the Circuit Court of the United States for the District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation.

Verdict.

We, the jury in the above entitled cause, find for the plaintiff and assess his damages at the sum of Five Thousand Dollars ($5000.).

WALTER A. PERKINS, *Foreman.*

Indorsed: Verdict. Filed Feb'y 9th, 1905. A. Reeves Ayres, Clerk, By R. M. Hopkins, Deputy.

11 In the United States Circuit Court, Ninth Circuit, Western District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON, Plaintiff,
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Judgment.

This cause came regularly on for trial in the above entitled court on the 8th day of February, 1905, the parties hereto appeared in

person and by their respective attorneys. A jury was regularly empaneled and sworn to try said cause. Witnesses on behalf of the plaintiff and the defendant were sworn and examined, and after hearing the evidence and the arguments of counsel for the respective parties and the instructions of the court the jury retired to consider of their verdict and on the 9th day of February, 1905, returned into court a verdict in favor of the plaintiff in the sum of five thousand ($5000.00) dollars, and the jury thereupon being called answered to their respective names and said that was the verdict of the jury. Thereafter, on the 15th day of February, 1905, judgment was rendered upon said verdict in favor of the plaintiff and against the defendant in the sum of five thousand ($5000.00) dollars. Thereupon defendant filed and served a motion for a new trial, which motion came on to be heard on the 3d day of April, 1905, and after argument of counsel for the respective parties the court ordered that said motion for a new trial be denied upon condition that the plaintiff remits from the verdict of the jury the sum of two thousand ($2000.00) dollars, to which order the plaintiff consented and did remit from said verdict the said sum of two thousand dollars and said motion for a new trial was by the court denied.

12 Now, therefore, by reason of the law and the premises, it is hereby ordered and adjudged that the verdict returned by the jury in this cause and the judgment rendered upon said verdict in favor of the plaintiff and against the defendant be and the same is hereby reduced from five thousand ($5000.00) dollars to three thousand ($3000.00) dollars, and that the plaintiff do have and recover from the defendant the sum of three thousand ($3000.00) dollars with interest thereon at the legal rate from the date of the entry of said verdict until paid, and his costs and disbursements as taxed, and that execution issues therefor.

Done in open court this 8th day of May, 1905.

C. H. HANFORD, *Judge.*

Indorsed: Judgment. Filed in the U. S. Circuit Court Western Dist. of Washington Nov 8 1905. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

13 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON, Plaintiff,

vs.

C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Certified Question on Writ of Error.

I, C. H. Hanford, District Judge presiding in the Circuit Court aforesaid, and the Judge before whom the above entitled cause was

tried, do now, on the 13 day of May, 1905, during the same term at which the judgment was entered herein, certify as follows:

Franson, the plaintiff, alleging himself to be a "resident of Washington and a citizen of Sweden," began this action in this court against defendant, alleging it to be a corporation duly organized and existing under the laws of Wisconsin and doing business in the state of Washington. The suit was for personal injuries as a servant in defendant's employment, for which injuries damages were claimed in a sum exceeding $26,000.

Defendant appeared, issue was joined, trial had, and a verdict returned against the defendant.

The residence and citizenship of the defendant was admitted by the pleadings, but that of plaintiff was denied as follows:—Plaintiff's allegation already quoted, "resident of Washington and citizen of Sweden," appearing in plaintiff's paragraph I, was denied by defendant stating that it "denies each and every allegation" of that paragraph and of sundry others. Upon proof, the following testi-
mony only appeared as to the citizenship or residence of the
14 plaintiff. Plaintiff being examined by his counsel, testified as follows:—"Q. Your nationality is what? A. Timber man. Q. What country are you from? A. From Sweden. Q. How long have you been in this country? A. Well, I have been in this country since May, 1903. Q. Since May, 1903? A. I came over from Sweden into Minnesota. Q. Were you in Seattle in August last? A. Yes sir."

This was all the evidence tending to prove the alienage of plaintiff except that his features, speech and manners indicated that he was a Scandinavian.

Between verdict and judgment, defendant moved to set aside the verdict and dismiss the cause for want of jurisdiction in this court, which motion was urged both orally and in writing, because plaintiff, neither by pleadings nor proof, had shown himself at any time to be a citizen or subject of any state, domestic or foreign, and this was the earliest objection made to the jurisdiction by the defendant. The motion to dismiss was overruled, with exception in defendant's favor.

Now, therefore, I do certify to the Supreme Court the following questions of jurisdiction. Should the motion to dismiss have been granted because, at the time of the commencement of this action, it was one of which this court could not take jurisdiction; that is to say: (*a*) Whether the allegation of plaintiff's being a citizen of Sweden was a sufficient allegation for the purposes of jurisdiction in this court in a suit between plaintiff and a corporation existing under the laws of Wisconsin. (*b*) Whether, supposing such
allegation sufficient, this court could have jurisdiction of a
15 controversy between such parties when the defendant did not specially appear and object *in limine*. (*c*) Whether the denials of plaintiff's citizenship and residence were sufficient to put these allegations in issue. (*d*) Whether, supposing these allegations to be in issue, the proof above recited is sufficient to support a verdict in favor of the plaintiff, the court having charged the jury

in effect that the question of the plaintiff's nationality was an issue to be decided and that for the plaintiff to be entitled to a verdict in his favor it was necessary for him to prove the allegation of his pleading by a fair preponderance of the evidence.

C. H. HANFORD,
District Judge, Presiding in the Circuit Court.

Indorsed: Certified question on writ of error. Filed in the U. S. Circuit Court Western District of Washington, May 13 1905. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

16 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

CHARLES FRANSON, Plaintiff,
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

The above named defendant, C. H. Nichols Lumber Company, feeling itself aggrieved by the judgment entered in this cause on the 8 day of May, 1905, prays the allowance of a writ of error to the Supreme Court of the United States, and elects to stand on the question of the jurisdiction of this court for the purposes of such writ, and prays that the clerk of this court may, within the time prescribed by law, send a true copy of the record, judgment, exceptions, assignment of errors, and all proceedings whatsoever in this cause, to the Clerk of the Supreme Court of the United States.

GRAVES, PALMER, BROWN & MURPHY,
Attorneys for Defendant.

On this 13th day of May, 1905, it was ordered that a writ of error be allowed in this cause as prayed hereinabove, and that the question of jurisdiction be certified to the Supreme Court.

C. H. HANFORD,
United States District Judge, Presiding in Said Circuit Court.

Indorsed: Petition for Writ of Error. Filed in the U. S. Circuit Court Western District of Washington May 13, 1905. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

17 In the Supreme Court of the United States.

C. H. NICHOLS LUMBER COMPANY, Plaintiff in Error,
vs.
CHARLES FRANSON, Defendant in Error.

Assignment of Errors.

The above named plaintiff in error, C. H. Nichols Lumber Company, files this its assignment of errors, and says that in the record and proceedings of the above entitled court, there is a manifest error in this, to wit, that in the trial of this cause in the Circuit Court of the United States for the Western District of Washington, said Circuit Court committed error as follows:

In denying the motion of defendant (now plaintiff in error) to dismiss the action brought by plaintiff (now defendant in error) because such action or suit did not, when begun or subsequently, by allegation or upon proof, involve a cause of action cognizable by said Circuit Court in respect to diversity of citizenship.

Wherefore, C. H. Nichols Lumber Company prays that the judgment of the Circuit Court of the United States for the Western District of Washington be reversed.

GRAVES, PALMER, BROWN & MURPHY,
Attorneys for Plaintiff in Error.

Indorsed: Assignment of errors. Filed in the U. S. Circuit Court Western District of Washington May 13, 1905. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

18 In the Supreme Court of the United States.

C. H. NICHOLS LUMBER COMPANY, Plaintiff in Error,
vs.
CHARLES FRANSON, Defendant in Error.

Bond on Appeal, Supersedeas.

Know all men by these presents, That we, C. H. Nichols Lumber Company, as principal, and American Bonding Company of Baltimore, as surety, are held and firmly bound unto the above named Charles Franson in the sum of Five Thousand Dollars, to be paid to the said Charles Franson, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing bond is as follows:

Whereas the above named Charles Franson did, on the 8th day of May, 1905, recover judgment against the above named C. H. Nichols Lumber Company in the sum of Three Thousand Dollars

and costs and whereas C. H. Nichols Lumber Company has sued out a writ of error to the Supreme Court of the United States to reverse that judgment;

Now, therefore, the condition of this obligation is this: If the above named Nichols Lumber Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation to be void otherwise to remain in full force and virtue.

Witness our hands and seals this 12th day of May, 1905.

C. H. NICHOLS LUMBER COMPANY,
By GRAVES, PALMER, BROWN & MURPHY AND FRED'K BAUSMAN, *Its Attorneys.*

19 AMERICAN BONDING COMPANY OF BALTIMORE,
By FRANK M. GUION, *Vice-President.*

Attest: CHARLES S. HILLS,
Assistant Secretary.

[Seal Am. Bond. Co. of Baltimore.]

The foregoing bond is approved this 13th day of May, 1905.
C. H. HANFORD, *Judge.*

Indorsed: Bond & supersedeas. Filed in the U. S. Circuit Court Western Dist. of Washington May 13, 1905. A. Reeves Ayres, Clerk, A. N. Moore, Dep.

20 In the Supreme Court of the United States.

C. H. NICHOLS LUMBER COMPANY, Plaintiff in Error,

—.

CHARLES FRANSON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court, before the Honorable C. H. Hanford, one of you, between Charles Franson, plaintiff, and now defendant in error, and C. H. Nichols Lumber Company, defendant and now plaintiff in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
21 with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court to be then and there held, in order that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13 day of May in the year of our Lord, 1905.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington,
By A. N. MOORE, *Deputy.*

[Seal U. S. Circuit Court.]

The above writ of error allowed this 13 day of May, 1905.
C. H. HANFORD, *Judge.*

Indorsed: Writ of error. Copy for def't in error. Filed in the U. S. Circuit Court Western District of Washington May 13, 1905. A. Reeves Ayres, Clerk, A. N. Moore, Deputy.

22 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1226.

CHARLES FRANSON, Plaintiff (Defendant in Error),
vs.
C. H. NICHOLS LUMBER COMPANY, a Corporation, Defendant (Plaintiff in Error).

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing 21 typewritten pages, numbered from 1 to 21, inclusive, to be full, true and correct copies of papers, records and proceedings in the above and therein-entitled cause, as such papers, records and proceedings now remain on file and of record in my office as such Clerk at Seattle in said Western District of Washington; and that the same constitutes the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the original citation issued in said cause.

I further certify that the cost of preparing and certifying the annexed return to Writ of Error is the sum of $19.60, and that the same has been paid to me by Solicitors for Plaintiff in Error, Defendant above named.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 22nd day of May, 1905.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES, *Clerk,*
By H. M. WALTHEW,
Deputy Clerk.

23 In the Supreme Court of the United States.

C. H. NICHOLS LUMBER COMPANY, Plaintiff in Error,
v.
CHARLES FRANSON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court, before the Honorable C. H. Hanford, one of you, between Charles Franson, plaintiff and now defendant in error, and C. H. Nichols Lumber Company, defendant and now plaintiff in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court to be then and there held, in order that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

24 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of May in the year of our Lord, 1905.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington,
By A. N. MOORE, *Deputy.*

The above writ of error allowed this 13 day of May, 1905.

C. H. HANFORD, *Judge.*

25 [Endorsed:] Original. No. 1226. In the United States Supreme Court. C. H. Nichols Lumber Company, Plaintiff in Error, *vs.* Charles Franson, Defendant in Error. Due service of the enclosed — admitted and a true copy received, this — day of —— 190–. —— ——, Attorneys for —— ——. Writ of Error. Graves, Palmer, Brown & Murphy Rooms 629-633 Pioneer Building Seattle, Wash. Attorneys for Plaintiff in Error. Filed in the U. S. Circuit Court, Western Dist. of Washington, May 13 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

26 In the Supreme Court of the United States.

C. H. NICHOLS LUMBER COMPANY, Plaintiff in Error,
v.
CHARLES FRANSON, Defendant in Error.

Citation on Writ of Error.

The United States of America to Charles Franson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within 60 days from the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein C. H. Nichols Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the present plaintiff in error and in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of May in the Year of Our Lord, 1905.

[Seal of the United States Circuit Court, Western District of Washington.]

C. H. HANFORD,
District Judge, Presiding in the Said Circuit Court.

Due service of the within citation on writ of error duly admitted this 12th day of May, 1905.

WALTER S. FULTON AND
MARTIN J. LUND,
Counsel for Def't in Error.

27 [Endorsed:] Original. No. 1226. In the United States Supreme Court. C. H. Nichols Lumber Company, Plaintiff in Error, *vs.* Charles Franson, Defendant in Error. Due service of

the enclosed — admitted and a true copy received, this — day of ——, 190–. —— ——, Attorneys for —— ——. Citation on Writ of Error. Graves, Palmer, Brown & Murphy Rooms 629–633 Pioneer Building Seattle, Wash. Attorneys for Plaintiff in Error. Filed in the U. S. Circuit Court, Western Dist. of Washington, May 13 1905. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

Endorsed on cover: File No. 19,783. W. Washington C. C. U. S. Term No. 281. C. H. Nichols Lumber Company, Plaintiff in Error, *vs.* Charles Franson. Filed May 31st, 1905. File No. 19,783.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court
FILED
APR 13 19
JAMES H. McKEN

No. [redacted]-30

C. H. NICHOLS LUMBER COMPANY,
Plaintiff in Error,

vs.

CHARLES FRANSON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Washington.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM L. MARBURY,
CARROLL T. BOND,
Attorneys for Plaintiff in Error.

Maryland Trust Building, Baltimore, Md.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 281.

C. H. NICHOLS LUMBER COMPANY,
Plaintiff in Error,

vs.

CHARLES FRANSON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an appeal by the C. H. Nichols Lumber Company, a corporation, from a judgment rendered against it in a suit by Charles Franson, in the Circuit Court for the Western District of the State of Washington.

Error is assigned in the denial of a motion by plaintiff in error (defendant below) to dismiss the cause for want of a proper showing in the case of diversity of citizenship of the parties, upon the basis of which the Federal jurisdiction was invoked. This single question of jurisdiction is certified directly to this Court.

Plaintiff in error is a corporation, created and organized under the laws of the State of Wisconsin. This fact is properly averred in the complaint (page 1) and is admitted in the answer (page 4). At the time of the events out of

which the suit arose that corporation was doing business in the State of Washington, owning and conducting a shingle mill there. Charles Franson, defendant in error, one of the employees in that mill, brought suit in the Court below to recover damages from the plaintiff in error for injuries alleged by Franson to have been caused by negligence of the plaintiff in error (pages 1 to 4). Suit was entered on October 3d, 1904. As ground of Federal jurisdiction the first paragraph of the complaint, after stating that the plaintiff in error was a Wisconsin corporation, averred that Franson himself (defendant in error) "now is and for more than one year last past has been a resident of Washington, and a citizen of Sweden." (Pages 1 and 8.)

In its answer plaintiff in error, referring to the first and other paragraphs of the complaint, "denied the same and each and every allegation thereof." (Pages 1 and 8.)

Upon trial before the Court and a jury the following testimony was given by defendant in error, FRANSON, on his own behalf :

"Q. Your nationality is what?

A. Timber man.

Q. What country are you from?

A. From Sweden.

Q. How long have you been in this country?

A. Well, I have been in this country since May, 1903.

Q. Since May, 1903?

A. I came over from Sweden into Minnesota.

Q. Were you in Seattle in August last?

A. Yes, sir."

There was no other testimony tending to prove alienage of the defendant in error. It appears from the certificate of the Court below that his features, speech and manners indicated that he was a Scandinavian. (Record, page 8.)

The Court below, in effect, charged the jury that the question of the nationality of the defendant in error was an issue

to be decided and that for the plaintiff to be entitled to a verdict in his favor it was necessary for him to prove the allegation of his pleading by a fair preponderance of the evidence. (Court's certificate, page 9.)

Verdict was found for the defendant in error for $5,000. On a motion for a new trial this was reduced to $3,000. (Page 7.)

Between verdict and judgment plaintiff in error (defendant below) moved to set aside the verdict and dismiss the cause for want of jurisdiction in the Court because defendant in error (plaintiff below), neither by pleadings nor proof, had shown himself to be a citizen or subject of any State, domestic or foreign. This motion was overruled with exception in favor of plaintiff in error, and thereafter, on the 8th day of May, 1905, judgment was entered for defendant in error. (Page 7.)

There was no bill of exceptions prepared, embodying exceptions taken during the trial before the jury, and no objection to the jurisdiction was made by plaintiff in error until his motion to dismiss the cause.

Error Assigned and Certificate.

The assignment of error (page 10) is as follows: "In denying the motion of defendant (now plaintiff in error) to dismiss the action brought by plaintiff (now defendant in error) because such action or suit did not, when begun or subsequently, by allegation or upon proof, involve a cause of action cognizable by said Circuit Court in respect to diversity of citizenship."

This question of jurisdiction is the only question to be determined on appeal and the sole question certified to this Court. It is stated in the certificate as follows:

"Should the motion to dismiss have been granted because, at the time of the commencement of this action, it was one

of which this Court could not take jurisdiction, that is to say:

"(*a*) Whether the allegation of plaintiff's being a citizen of Sweden was a sufficient allegation for the purposes of jurisdiction in this Court in a suit between plaintiff and a corporation existing under the laws of Wisconsin.

"(*b*) Whether, supposing such allegation sufficient, this Court could have jurisdiction of a controversy between such parties when the defendant did not specially appear and object *in limine*.

"(*c*) Whether the denials of plaintiff's citizenship and residence were sufficient to put these allegations in issue.

"(*d*) Whether, supposing these allegations to be in issue, the proof above recited is sufficient to support a verdict in favor of the plaintiff, the Court having charged the jury in effect that the question of the plaintiff's nationality was an issue to be decided, and that for the plaintiff to be entitled to a verdict in his favor, it was necessary for him to prove the allegation of his pleading by a fair preponderance of the evidence."

POINTS OF LAW.

I.

The Circuit Court Did Not Acquire Jurisdiction of the Cause.

1. To confer jurisdiction upon the Federal Court the record of a cause must contain a distinct, positive statement of sufficient jurisdictional facts.

> "That the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings, or should

appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; * * * are propositions so firmly established that further discussion of them would be both useless and inappropriate."

Thomas vs. Board of Trustees, 195 U. S. 207, 210.

2. AT THE TIME OF THE MOTION TO DISMISS THERE WAS NO POSITIVE, AFFIRMATIVE SHOWING OF SUFFICIENT JURISDICTIONAL FACTS, AND THE RECORD STILL LACKS THIS ESSENTIAL PREREQUISITE.

THE ALLEGATION IN THE COMPLAINT, THAT PLAINTIFF WAS A "CITIZEN OF SWEDEN," IS NOT A SUFFICIENT AVERMENT TO CONFER JURISDICTION ON THE GROUND OF DIVERSITY OF CITIZENSHIP OF PARTIES.

At the time of suit brought, Sweden was under a monarchical form of government, being, jointly with Norway, under the rule of the King of Sweden and Norway. The Court will take judicial notice of these facts concerning the sovereignty of another nation, and, furthermore, the recognition and acceptance of such a political condition by this government in the treaties made with the sovereign authorities of Sweden and Norway are noticed by the Court and are binding upon it.

Jones vs. United States, 137 U. S. 202, 212, 214.

THE GOVERNMENT OF SWEDEN BEING A MONARCHY, THEREFORE, PERSONS OWING ALLEGIANCE TO IT WERE TO BE DESCRIBED ONLY AS "SUBJECTS" OF SWEDEN, AND THERE COULD BE NO SUCH THING AS A "CITIZEN" OF THAT COUNTRY. The allegation that defendant in error was a "citizen" of Sweden could not, therefore, be correct, and it is not a sufficient allegation of alienage or citizenship to serve as foundation for the jurisdiction below.

In Stuart vs. Easton, 156 U. S. 46, an allegation that one of the parties was "a citizen of London, England," was held insufficient to confer jurisdiction, for the reason that Great Britain, being under a monarchical form of government, had only "subjects," and no "citizens."

In Hennessy vs. Richardson Drug Company, 189 U. S. 34, this Court, further defining this rule, said: "In Stuart vs. Easton, 156 U. S. 46, it was held that by the description of plaintiff as 'a citizen of London, England,' the fact that he was a subject of the British Crown was not made affirmatively to appear as required; but in the case at bar, complainants described themselves as 'all of Cognac, France, and citizens of the Republic of France,' and this was sufficient."

These rulings were followed and applied also in Bishop vs. Averill, 76 Fed. Rep. 386, a case before the Court below, in which an allegation of citizenship in the province of British Columbia was held insufficient, and in Rondot vs. Township of Rogers, 79 Fed. Rep. 676, in which Taft, J., held bad an allegation that one party was a "citizen of Great Britain."

THE STATEMENTS OF DEFENDANT IN ERROR IN HIS TESTIMONY ARE EQUALLY INSUFFICIENT FOR THE PURPOSE OF CONFERRING JURISDICTION.

It is not necessary that the affirmative showing of jurisdictional facts be by way of averments in the complaint. It may be in the proofs.

> "It is settled that the jurisdiction of a Court of the United States must appear from distinct allegations or from facts clearly proven."
>
> Thomas vs. Board of Trustees, 195 U. S. 218.

But wherever the facts are stated they must meet the same requirements and one and the same standard of sufficiency, and statements which, in the complaint, would be insufficient to confer jurisdiction, are equally insufficient when made in

testimony. Such testimony may either state exactly the necessary jurisdictional facts, or it may state other facts from which the jurisdictional facts necessarily follow. An instance of the latter condition is in the case of Sun Printing, &c. Association vs. Edwards, 194 U. S. 377, in which the testimony, in a suit in the Southern District of New York, left it impossible that the plaintiff should have been anything else than a citizen of Delaware or a citizen or subject of a foreign State, in either of which events the Circuit Court's jurisdiction was clear. As a result in that case, the plaintiff's averment in his complaint, that he was a "resident of the State of Delaware," so explained and defined in the testimony, amounted to an averment that he was a "citizen" of Delaware, and this Court so construed it.

The result of the testimony on the jurisdictional facts in this case is that defendant in error, who seemed to look, speak, and act like a Scandinavian, "came from Sweden," had been in this country since May, 1903, "came over from Sweden to Minnesota," and was in Seattle in August, 1904. (Record, page 8.) It nowhere contains a statement of plaintiff's allegiance, certainly not an affirmative, positive statement. The nearest to such a statement of citizenship or alienage is that plaintiff "came from Sweden," which is equivocal in meaning and states no actual connection with Sweden. It does not state directly and positively that plaintiff was a subject of the King of Sweden and Norway, nor does it so state facts from which this would necessarily follow. It does not state that he was born in Sweden or that he resided in that country for any length of time. It is quite compatible with the evidence that he was born and lived nearly all his life up to 1903 in another country, or even that he is a natural born citizen of theUnited States.

Averments of equal definiteness, and showing some actual connection with the places mentioned, have been held insufficient.

In Grace vs. American Central Insurance Company, 109 U. S. 278, 285, an averment that a party was "of the county of Kings and State of New York" was so regarded, and in Horne vs. Hammond Co., 155 U. S. 393, an averment that plaintiff was "the widow of the late Granville P. Horne, of Chelsea, Suffolk county, Commonwealth of Massachusetts," was also held bad.

At the best the statements in the testimony fall far short of an affirmative, positive showing that defendant in error was a subject of the King of Sweden and Norway. And as such a statement does not appear in the complaint, it does not appear, therefore, anywhere in the case, and at no time did the Court below have the necessary basis of jurisdiction before it.

3. EVEN IF THE AVERMENT IN THE COMPLAINT HAD BEEN SUFFICIENT IN ITSELF, THE CIRCUIT COURT WOULD HAVE BEEN WITHOUT JURISDICTION BY REASON OF THE ABSENCE OF CLEAR PROOF OF THE NECESSARY JURISDICTIONAL FACTS.

THE ANSWER WOULD HAVE PUT IN ISSUE THE CITIZENSHIP AVERRED, AND PLAINTIFF WOULD HAVE BEEN REQUIRED TO PRODUCE CLEAR PROOF OF THE REQUIRED FACTS.

The averment that plaintiff was a "citizen of Sweden" was made in the first paragraph of the complaint; and the defendant in its answer denied paragraph 1 of the complaint "and each and every allegation thereof."

Whether under the pleadings such a denial would be sufficient to place in issue the facts alleged in the first paragraph depends upon the practice in the State of Washington.

> "Since 1872, when Congress assimilated the rules of pleading, practice and forms and modes of procedure in actions at law in the Courts of the United States to those prevailing in the Courts of the several States, all defences are open to a defendant in the Circuit Court of the United States, under any form of plea, answer or demurrer, which would have been open to him under

like pleading in the Courts of the State within which the Circuit Court is held."

Roberts vs. Lewis, 144 U. S., 653, 656.

BALLINGER'S ANNOTATED CODES AND STATUTES OF WASHINGTON contains the following provisions:

"Sec. 4907. GROUND OF DEMURRER OF DEFENDANT.

The defendant may demur to the complaint when it shall appear upon the face thereof either,—

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action;

2. That the plaintiff has no legal capacity to sue; or

3. That there is another cause of action pending between the same parties for the same cause; or

4. That there is a defect of parties, plaintiff or defendant; or

5. That several causes of action have been improperly united;

6. That the complaint does not state facts sufficient to constitute a cause of action;

7. That the action has not been commenced within the time limited by law.

Sec. 4909—OBJECTIONS, WHEN TO BE TAKEN BY ANSWER.

When any of the matters enumerated in section 4907 do not appear upon the face of the complaint, the objection may be taken by answer.

Sec. 4911—OBJECTIONS NOT TAKEN DEEMED WAIVED.

If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the Court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the Superior or Supreme Court.

Sec. 4912—What Answer Shall Contain.

The answer of the defendant must contain,—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

Under these statutes the averment in the complaint, if it had been sufficient, would have been placed in issue, and, the Court must have proceeded as if the jurisdictional averment were unsustained, unless and until there should be produced proof sufficient to support the jurisdiction. And the burden was upon the plaintiff to produce such proof; and lacking that, the Court would lack jurisdiction of his cause.

Under exactly the same statutory provisions, in the Nebraska Code, this Court has held that a denial of "each and every allegation" of a petition would have this effect upon a sufficient averment of jurisdictional facts.

Roberts vs. Lewis, 144 U. S., 653.

In that case the plaintiff alleged that he was a resident of Milwaukee and a citizen of Wisconsin, and that defendant was a resident of the city of Lincoln and a citizen of Nebraska. The defendant denied "each and every allegation in said petition contained." On page 657 this Court said:

> "Under this code, as under the code of New York, upon which it was modelled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of 'each and every allegation in the petition' puts in issue every material allegation therein, as fully as if it had been specifically and separately denied. And by the express terms of Secs. 94, 96, [equivalent to Secs. 4907 and 4909 of the Washington code] above cited, an objection that the Court has no jurisdiction,

either of the person of the defendant or of the subject of the action, may be taken by demurrer, if it appears on the face of the petition, and by answer if it does not so appear.

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point on which the jurisdiction of the Circuit Court depended, the judgment must be reversed."

"The absence of proof upon the issue of fact tendered by the answer required the Court to proceed as though the plaintiffs' averments of the jurisdictional status of the parties were unsustained. * * * The conclusion is unavoidable that the Circuit Court was without jurisdiction."

Yocum vs. Parker, 130 Fed. Rep. 770 (C. C. A. 8th Circt.)

It has already been argued that the testimony that plaintiff "came from Sweden into Minnesota in 1903," and the fact that he appeared to be of Scandinavian origin would not fulfill the requirements of an affirmative, positive and distinct showing of the plaintiff's allegiance, and would fall far short of showing that plaintiff was a subject of the Kingdom of Sweden and Norway.

Stuart vs. Easton, 156 U. S. 46.

Hennessy vs. Richardson Drug Co., 189 U. S. 25, 34.

As a result, even if the matter were left to the jury as one of the issues in the case to be determined by them, this testimony would not support a verdict that plaintiff was an alien. The jury could only find positively that plaintiff came from Sweden in 1903, and any facts beyond that, necessary to

show he was a subject of the King of Sweden and Norway, they could only hit upon by mere speculation and conjecture, out of their own minds.

It is respectfully submitted that in this case, however, the averment of jurisdictional status made in the complaint is insufficient, and, if a jury should pronounce it true, would continue insufficient—unless, of course, its defects should be corrected in evidence or elsewhere in the record. The Court could not be satisfied with a jury's finding that plaintiff was a "citizen of Sweden." The allegation being, therefore, insufficient to confer jurisdiction, and not otherwise material, the denial of it can hardly be said to have put it in issue as one of the material facts for the determination of the jury.

II.

The Question of Jurisdiction Was Presented to the Court in Such Way as to Require its Action, Denying its Jurisdiction.

Courts have only a limited function in dispensing justice in that, ordinarily, they cannot decide a question not in controversy between litigants and not submitted by them for decision. From that rule it would necessarily follow that for sake of fairness to the other party, as well as for the sake of orderliness, one party will be required to submit a question raised by him at a certain stage of the proceedings and in a certain form, or otherwise the question should be treated as waived and not submitted, and the Court could not decide it. Objections to the jurisdiction of Courts are usually required to be raised *in limine* by an appropriate plea or answer, or they are considered waived and out of the case. This was formerly true in the Courts of the United States, and parties were there, as in other Courts, required to raise questions of jurisdiction, such as the one presented in this case, at the specified stage and in the specified form, or the questions were waived and not before the Court for decision. But the

question has since been placed on a different basis in the United States Courts.

Under the Act of March 3, 1875, c. 130, such a question is not presented as a matter of controversy between parties, at their disposal, but presents itself to the Court, with or without any action by the parties.

> "While under the Judiciary Act of 1789, an issue as to the fact of citizenship could only be made by plea in abatement, when the pleadings properly averred the citizenship of the parties, the Act of 1875 imposes upon the Circuit Court the duty of dismissing a suit, if it appears at any time after it is brought and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the Court."
>
> Morris vs. Gilmer, 129 U. S. 315, 326.
>
> Steigleder vs. McQuesten, 198 U. S. 141, 142.

> "This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of parties to it."
>
> M. C. & L. M. Ry. vs. Swan, 111 U. S. 379, 382.

> "It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the Court, even if the parties fail to call attention to the defect, or consent that it may be waived."
>
> Thomas vs. Board of Trustees, 195 U. S. 211.

If, then, the Court must act upon the absence of sufficient averments or facts in the record, without reference to the attitude of the parties, no steps the parties might take, and no failure to take any steps such as a special appearance and

objection *in limine* will affect the question of jurisdiction. That being so, ANY FORM OF PRESENTATION OF THE QUESTION IS SUFFICIENT, FOR ONCE A DEFICIENCY IN THE RECORD IS BROUGHT TO THE COURT'S ATTENTION IT IS ITS DUTY TO ACT UPON IT. Accordingly this Court has held such action to be timely under widely different circumstances and at various stages of proceedings.

In Steigleder vs. McQuesten, 198 U. S. 141, 143, it was held that a motion to dismiss the cause, based upon proofs taken by a Master in Chancery, was an appropriate mode in which to raise the question of the jurisdiction of the Circuit Court.

In Morris vs. Gilmer, 129 U. S. 315, question of jurisdiction was raised by a motion to dismiss based upon facts appearing in affidavits and testimony in the case, and made before final hearing. It was urged on behalf of the plaintiff that the defendant was precluded from raising the question of jurisdiction by inviting the action of the Court upon a plea of former adjudication and by waiting until the Court had ruled that plea insufficient before questioning the jurisdiction. This Court said (page 326): "We have already seen that this Court must, upon its own motion, guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the Circuit Court has or has not jurisdiction is a question which this Court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits."

In Thomas vs. Board of Trustees, 195 U. S. 207, the objection was first made by one of two defendants in the argument in the Circuit Court of Appeals.

In Cooper vs. Newell, 155 U. S. 532, the question of the sufficiency of an averment that defendants were all "residents of Galveston County, in the State of Texas," was first raised in the brief in the Supreme Court.

WHEN THE COURT IN WHICH THE QUESTION OF JURISDICTION IS RAISED, FINDS THERE IS NO SUFFICIENT BASIS FOR JURISDICTION, IT SHOULD DISMISS THE CAUSE ABSOLUTELY, OR, IN ITS DISCRETION, GIVE LEAVE TO AMEND THE PROCEEDINGS BY SUPPLYING THE DEFICIENCY IF POSSIBLE.

> "But we cannot feel sure from this general language [in a motion in arrest of judgment], or from anything in the record, that attention was called in the Court below to the defect in the pleadings to which our attention has been specially directed. For these reasons the defendant in error should be allowed to amend the petition in respect to his citizenship at the commencement of the action, if his citizenship was then such as to authorize the Court to proceed with the trial. * * * The judgment of the Circuit Court must, therefore, be reversed, with directions to grant a new trial, and for such further proceedings as may be in conformity to this opinion."
>
> Robertson vs. Cease. 97 U. S. 646, 651.

> "This record does not show that the Circuit Court had jurisdiction of the suit, which depends alone on the citizenship of the parties. * * *. For this reason the judgment is reversed, but, as the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear, the reversal will be at his cost in this Court. If the citizenship of the defendants was, in fact, such at the commencement of the suit as to give the Circuit Court jurisdiction, it will be in the power of that Court, when the case gets back, to allow the necessary amendment to be made and then proceed to trial."
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> Halsted vs. Buster, 119 U. S. 341, 342.
>
> Everhart vs. Huntsville College, 120 U. S. 223, 224.

In this case it is submitted, then, that the averments in the complaint were insufficient to confer jurisdiction upon the Circuit Court, and the evidence even more so, and at no time during the proceedings did the Court have jurisdiction

of the cause. Therefore, at the time the motion to dismiss was presented, it was without jurisdiction, as was contended in the motion, and was required to dismiss the cause, with leave to amend and proceed anew, in the Court's discretion. The refusal of the Circuit Court to recognize the lack of jurisdiction and to act so, was, it is submitted, reversible error.

The plaintiff in error respectfully submits that, for reasons set out above and here briefly summarized, the specific questions in the certificate of the Circuit Court (Record page 8) should be answered as follows :

(*a*) The allegation of plaintiff's being a citizen of Sweden was not a sufficient allegation for the purposes of jurisdiction in the Circuit Court in a suit between plaintiff and a corporation existing under the laws of Wisconsin. Sweden was at the time of suit filed governed by a monarchy, and persons owing allegiance to that government were subjects of the King of Sweden and Norway, and there is no such thing as a "citizen of Sweden." From the allegation, therefore, it does not sufficiently appear that plaintiff was a subject of the King of Sweden and Norway, if he was.

Stuart vs. Easton, 156 U. S., 46.
Hennessy vs. Richardson Drug Co., 189 U. S. 25, 34.

(*b*) If the allegation had been a statement of alienage sufficient to confer jurisdiction, as the Circuit Court supposes in its question, it would have had jurisdiction until this allegation was denied and the case concluded without its having been sustained by proof. Denial of a sufficient allegation could have been made only in the answer, not by way of special appearance and objection *in limine*. Ballinger's Annotated Code, etc., sections 4907, 4909. The question as asked should, therefore, be answered in the affirmative : that in the absence of special appearance and objection *in limine*

the Circuit Court could have had jurisdiction—unless the allegation was denied and not sustained by proof.

(*c*) If the allegations in the complaint had been sufficient, as still seems to be supposed, the denial in the first paragraph of the answer would have been sufficient to put those allegations in issue.

Roberts vs. Lewis, 144 U. S. 653, 657-8.
Yokum vs. Parker, 130 Fed. Rep. 770.
Ballinger's Code, etc., Secs. 4907, 4909.

(*d*) If such sufficient allegations had been so put in issue, the proof that plaintiff was "from Sweden," and "came from Sweden to Minnesota in 1903," would not be sufficient to support a verdict for the plaintiff. The allegations in the complaint having been denied, it would have been essential to the plaintiff's recovery that he sustain them by proof. The burden of proof would have been upon him to support them by evidence.

Roberts vs. Lewis, 144 U. S. 653, 657-8.
Yocum vs. Parker, 130 Fed. Rep. 770.

The proof adduced did not show that plaintiff had any real connection with Sweden and its sovereign, and the jury would have been totally unable to find from the evidence any facts sufficient to show that he owed allegiance to that government rather than to any other government, or that he was not a citizen of the United States, and of the State of Washington, where he brought his suit.

But it is submitted that the allegation in the complaint, in itself insufficient to confer jurisdiction, is not so supplemented by proof or otherwise as to make the necessary facts clear upon the record; that it is not necessary that the question should have been raised by special appearance and objection *in limine*, as the Court must be constantly open to suggestion of the deficiency, and must act whenever and however it is brought to the Court's notice; that if the alle-

gation in the complaint had been sufficient, if not denied, still it would have been denied by the answer, and proof further than that produced would have been necessary to support jurisdiction. For these reasons the general question of the certificate should be answered affirmatively; that is: the motion to dismiss the cause should have been granted, because at the time of the commencement of the action, and also throughout the later proceedings, the cause was one of which the Circuit Court could not take jurisdiction.

ANSWER TO MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

The plaintiff in error submits that the motion should be denied for the reasons here set forth:

The motion is based upon four grounds:

1. That the record does not contain all the proceedings in this cause;

2. That such part of the record as is before this Court does not contain the certificate of the clerk of the Circuit Court;

3. That there is no bill of exceptions in this cause;

4. That the order of the lower Court mentioned in the writ of error is not one from which a writ of error lies.

The first and third grounds, on the incompleteness of the record, and the absence from it of a bill of exceptions, can be more easily discussed together.

The record transmitted to this Court contains the complaint, the answer, the reply, and the judgment; the application for the writ of error, the writ, the bond, the citation, and the certificate of the Circuit Court. These papers are transmitted in pursuance of the writ ordering the clerk to transmit the record and all proceedings, and the list would include, in a suit at law, the entire record, unless some other paper or testimony should have been regularly added. It does not appear that there was any such addition. Defend-

ant in error suggests (page 6 of his brief) that the record lacks the motion to dismiss the cause for want of jurisdiction. He is not understood to contend that this motion was actually put in writing and filed, and there is nothing in the Court's certificate to give rise to such a conclusion, yet a written form of the motion would be the only possible addition to the record.

Again, the defendant in error admits that no bill of exceptions was ever filed, served or proposed, &c., (page 2 of his brief).

It is furthermore submitted that defendant in error, in his motion to dismiss the writ of error, overlooks the distinction between a writ of error bringing before this Court a question of jurisdiction, and one bringing up a question merely in controversy between litigants. As has been pointed out earlier in the brief of plaintiff in error, the question of jurisdiction is not one to be settled as between the parties to a suit, on their pleadings, but is a question for the Court altogether apart from the parties.

M. C. & L. Ry. vs. Swan, 111 U. S. 379, 382.

> "The statute [Act March 3, 1875, c. 130], does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the Court, nor how such question, when raised, shall be determined."

Wetmore vs. Rymer, 169 U. S. 115, 120.

There is no requirement that there be a formal written motion for the purpose. The question being one for the Court to decide for itself irrespective of the action or inaction of the parties, their action would have no real bearing and any proceeding by them would have no real function in the case. Everything necessary to the review of the action of the Court below is found in the averments, allegations and statements going to show jurisdictional facts, and these the Court has complete in the record before it.

And so with regard to the lack of a bill of exceptions complained of. Referring again to the rule that the question of jurisdiction is one for the determination of the Court itself, at any time and stage of the proceedings, it appears that the Court has the choice of method and procedure to assist it to a decision. If the question is one of disputed facts, it may take the decision of a jury upon them, or in that, or any other event, it may determine the question itself, unaided. If the Circuit Court so takes up the question without the intervention of parties, it may act upon allegations and evidence already in the case, without objection and without a ruling and exception, so as to admit of any bill of exceptions by a party.

In this case the Court, taking up the question between verdict and judgment, was satisfied to sustain the jurisdiction upon the allegations and evidence then in the case. This it had power to do, upon the condition that it should set forth its action in some form which would enable the defendant in error to bring the question before this Court.

> "But whether the judge shall elect to submit the issues to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the Circuit Court. As we have already said, if the questions are submitted to the jury, there will be a ready remedy, by proper exceptions and a writ of error, to correct any errors into which the trial Court may have fallen. And if the Court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of Congress, that its action must take a form that will enable this Court to review it, so far as to determine whether the conclusion of the Court below was warranted by the evidence before that Court."
>
> Wetmore vs. Rymer, 169 U. S. 115, 121.

In this case the question was one of sufficiency of averments and statements and this the Court decided for itself

in such a way as to leave no opportunity or necessity for the ordinary bill of exceptions, and the only method of preserving the right to submit the decision to this Court was the one adopted by the Circuit Court in its certificate.

With regard to the second ground of the motion to dismiss the writ of error: that the record before this Court does not contain the certificate of the clerk of the Circuit Court, the plaintiff in error respectfully refers the Court to the clerk's certificate on pages 12 and 13 of the record.

This certificate is under the seal of the Court, signed in the name of the clerk by the deputy clerk, which is a compliance with part 1 of rule 8 of this Court. It certifies that the papers preceding it, as the record of the case, are full, true and correct copies, and it thereby fulfills the purpose of the certificate required by rule 8. If it be objected that the certificate does not state that the papers and proceedings comprise all the proceedings in the case, as is noted on page 6 of the brief of defendant in error, it may be replied that it is the business of the parties to see that the proceedings are complete, and that of the clerk only to authenticate what is transmitted. It is proper for the parties to omit part, and in such event the clerk could not certify that the record includes all proceedings. If the record is insufficient the appeal may be dismissed on that ground, without reference to the certificate; and, on the other hand, if the record is sufficient, the clerk's certificate has authenticated it fully.

The remaining ground for the motion to dimiss the writ of error is that it is sued out to review an order of the Circuit Court rather than a final judgment. This contention is based upon the fact that the judgment was originally entered February 15, 1905, for $5,000, and after the hearing of the motion for a new trial was reduced to $3,000 by order of the Court, on May 8, 1905. The defendant in error contends that it is from this, a mere order, that the writ is sued out, and that the writ does not lie from such an order.

The application for the writ (page 9 of Record) recites that the defendant (below) felt itself aggrieved by the *judgment* entered in the cause on the 8th day of May, 1905, and thereupon prays allowance of the writ of error to this Court.

The assignment of errors "prays that the judgment of the Circuit Court of the United States for the Western District of Washington be reversed." (Record, page 10.)

It is submitted that there is nothing in these proceeding to support a contention that plaintiff in error sues out its writ from anything other than the final judgment to which the proceedings explicitly refer.

Respectfully submitted,

WILLIAM L. MARBURY,
CARROLL T. BOND,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

C. H. NICHOLS LUMBER COMPANY, a Corporation,
Plaintiff in Error.

v.

CHARLES FRANSON,
Defendant in Error.

No. 281.

MOTION TO DISMISS WRIT OF ERROR.

The defendant in error moves the court to dismiss the writ of error herein upon the ground that the record in this court does not contain all of the proceedings in this cause, and that such part of the record as is before this court does not contain the certificate of the clerk of the Circuit Court, and that there is no bill of exceptions in this cause, and that the order of the lower court mentioned in the writ of error is not one from which a writ of error lies.

BRIEF IN SUPPORT OF THE MOTION.

STATEMENT.

Defendant in error commenced this action in the Circuit Court of the ninth circuit district of Washington, Oct. 3, 1904, to recover damages for personal injuries alleged to have been sustained while in the employ of

plaintiff in error and through its negligence. Plaintiff in error appeared generally and filed and served an answer to the complaint, and pleaded affirmatively contributory negligence, assumption of risk, and the negligence of a fellow servant. The issues so formed came on for trial before a jury on February 8th, 1905, and at the close of the trial the jury returned a verdict in favor of the defendant in error in the sum of $5,000. On the 15th day of February, 1905, judgment was entered upon this verdict in favor of the defendant in error and against plaintiff in error. (Rec., pp. 1, 2, 3, 4, 5, 6.) On the 8th day of May, 1905, the court made an order reducing the verdict and the judgment from $5,000 to $3,000. This was done with the consent of defendant in error. The record sent up to this court contains only a part of the files and papers in the Circuit Court. (Rec. p. 12.) No bill of exceptions was ever filed, served or proposed or certified in this case.

On May 13th, plaintiff in error filed a petition for a writ of error to this court and assignment of error; the petition was allowed, a writ of error issued and questions certified. This was all done without any notice to the defendant in error or his attorneys.

ARGUMENT.

A rule of law can only be applied after the facts have been either found by the court or admitted by the parties. One party to a suit is not allowed to establish the facts contended for by him without notice to or knowledge of the opposite party. Rule 75 of the rules of the Circuit Court for the ninth circuit provides:

"The party desiring the bill shall within 10 days after the ruling was made * * * serve upon the adverse party a draft of the proposed bill of exceptions. The exceptions must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party." The rule further provides how the adverse party may propose amendments, and that the clerk shall give notice to all parties of the time when the court will settle the bill of exceptions. Nothing of this was done in the case at bar. No bill of exceptions was ever proposed or settled. But in the questions certified to this court certain facts are recited, to-wit: What the allegations of the complaint were as to the citizenship of the defendant in error. What the denials of the answer were, and what the proof was; what objection or motion was made and what the ruling was and that exceptions were allowed. These recitals were prepared by the plaintiff in error and signed by the court ex parte and without notice to defendant in error. The recitals so prepared and signed cannot be allowed to take the place of a bill of exceptions. The case was tried to the jury and occupied two days, February 8 and 9. It was impossible for the court to remember on May 13th, 1905, what the testimony was, and a recital of the facts so proposed and signed ex parte without giving defendant in error an opportunity to be heard cannot be made a basis for the decision of this court. As well might the plaintiff in error have gone before the court and jury in the first instance and in the absence of the defendant in

error and without his knowledge established the facts contended for by it, and asked for the verdict of the jury and judgment of the court upon the facts so established, before the defendant in error had an opportunity to be heard. How is this court to know, without a properly certified bill of exceptions, certified only after both parties have had an opportunity to be heard, that if the defendant had had an opportunity to propose amendments to the bill and to be heard, he could have shown that the complaint was amended at the trial and that the proof of his foreign citizenship was certain and conclusive, and that no objection to the jurisdiction of the court was ever made until long after the entry of judgment and the expiration of the term of court? Indeed, it appears from the record now before the court that the verdict was returned February 9th, and that the judgment was entered February 15th, and that the writ of error is not from the judgment, but from the order of the court entered May 8th, reducing the verdict and judgment from $5,000 to $3,000. No writ of error lies from this order on the part of plaintiff in error, for it is obtained by it and for its benefit. The fact that it is called a judgment does not make it so, as on its face it is only an order.

Felix v. Scharnweber, 125 U. S. 54, 8 Sup. Ct. 759;

Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055;

Redfield v. Parks, 130 U. S. 623;

Bank etc. v. Caldwell, 11 Sup. Ct. 162, 154 U. S. 592.

In *Bank v. Caldwell, supra,* the court holds:

"Ordered by the court that the judgment of the circuit court for the district of Louisiana be affirmed without an opinion, no bill of exceptions appearing to have been taken during the trial."

In *Felix v. Scharnweber, supra,* the court, dismissing a writ of error, says:

"As has been more than once observed by this court, the office of the certificate as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question. *Parmerlee v. Lawrence,* 11 Wall. 36, 39; *Brown v. Atwell,* 92 U. S. 327, 330."

In *Hanna v. Maas, supra,* the court says:

"The object of a bill of exceptions is to put on record rulings and instructions in matter of law, which could not otherwise be subject to revisions in a court of error. The excepting party, in order to entitle himself to such revision must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the ruling or instructions of which he complains. * * * If the exceptions so drawn up by the party in writing are found to be true, they are sealed, or often in the practice of the federal court, merely signed by the presiding judge. * * * Our duty and authority are limited to determining the validity of exceptions duly framed and presented. The defendants having failed to reduce their exceptions to such form that this court can pass upon them, the judgment must be affirmed. *Suydam v. Williamson,* 20 How. 427; *Ins. Co. v. Sea,* above cited."

While a ruling may be reviewed without a bill of exceptions if the error appears on the face of the pleadings

or record as the ruling on a demurrer, that cannot be done in the case at bar, for the transcript of the pleadings shows that it does not contain all the pleadings in the court below. The clerk certifies as follows:

"Do hereby certify the foregoing 21 typewritten pages, numbered from 1 to 21, inclusive, to be full, true and correct copies of papers, records and proceedings in the above entitled cause," etc.

The certificate does not show that it is a transcript of all the papers, records and proceedings, and the record shows on its face that it does not contain all the pleadings, for the questions certified to this court recites that, "between verdict and judgment, defendent moved to set aside the verdict and dismiss the cause for want of jurisdiction in this court, which motion was urged both orally and in writing." This motion is not found in the record before this court. There are also many other papers and pleadings not included.

At the trial the diverse citizenship of the parties appeared and was proved with certainty, and this would have appeared, if a bill of exceptions had been before this court, and such proof having been admitted at the trial it is sufficient without being alleged in the pleadings, as the pleadings are considered amended to correspond with the proof.

Jumeau v. Brooks (C. C. App.) 109 Fed. 353.

The court says:

"The declaration and pleadings failed to show the jurisdiction of the circuit court. The plaintiff, who had brought the suit, moved the court to dismiss the case for

want of jurisdiction. The court overruled the motion and made an order allowing the defendants to amend the pleadings so as to show that the plaintiff was a citizen of France and the defendants citizens of Florida. But this amendment does not appear to have been made. The plaintiff, however, who has brought the suit, cures this defect in the record by the bill of exceptions which he has taken. It appears from the evidence made part of the record by the bill of exceptions, that Laurent was a citizen of France, and William M. Brooks and Sue G. Brooks citizens of Florida. If the order made by the court to amend the pleadings had been complied with the jurisdiction of the court would have appeared in the most formal way. The jurisdictional facts appearing in the bill of exceptions is, we think, sufficient to sustain the jurisdiction. *Denny v. Pironi,* 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657.

ON THE MERITS.

If the court should overrule the foregoing motion we submit the following on the merits.

THE FACTS.

The plaintiff brought this action basing the jurisdiction of the court upon the following facts alleged in paragraph 1 of his complaint:

"That the above named defendant is, and at all the times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin and doing business in the State of Washington, and the owner of a certain shingle mill

at Kingstone, Kitsap County, Washington, * * * and engaged in operating the same. That the plaintiff now is and for more than one year last past has been a resident of the State of Washington, and a citizen of Sweden." The complaint then proceeds, and in seven additionl paragraphs alleges that the plaintiff, while employed by defendant in this mill, suffered an injury, through defendant's negligence. The defendant did not move against the complaint, nor demur to it, but answered as follows:

Referring to paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 *this plaintiff* denies the same and each and every allegation thereof, excepting as hereinafter admitted. * * * Defendant admits that it is and was a corporation organized under the laws of the State of Wisconsin, and doing business in the State of Washington. It admits that plaintiff had his hand injured in some manner at or about the time mentioned in said complaint."

The answer further alleges affirmatively contributory negligence and assumption of risk on the part of the plaintiff and the negligence of a fellow servant. (Rec. 1, 2, 3, 4, 5.)

Plaintiff in error did not question the jurisdiction of the court until after verdict. The questions certified to this court recite that between verdict and judgment defendant moved to set aside the verdict and dismiss the cause for want of jurisdiction in this court, which motion was urged both orally and in writing." If the motion was before this court it would show that it was not only made after verdict, but after judgment and after the expiration of the term of court.

Ordinarily the law does not allow a party to a suit to sit silently by and remain silent upon a technical point and take his chances of a verdict in his favor, reserving the certain right to set it aside, if against him. The law requires a party to take advantage of a technical defect by motion or demurrer, or it is considered waived. But while this is not true, where the defect consists in the lack of jurisdiction in the court, if the jurisdictional facts do really exist, but are not alleged as specifically as could be done, if the jurisdictional facts have been proven at the trial and after verdict every presumption and inference in favor of the allegations of the pleadings are to be drawn in support of the verdict, and the complaint is considered as amended to correspond to the proof. Such is the law and practice in the State of Washington.

2 Bal. Code, of Washington, 4931;

Isaacs v. Holland, 4 Wash. 54;

Johnson v. Leonard, 1 Wash. 564;

Murry v. Meade, 5 Wash. 693;

This also is the rule in other jurisdictions.

Evans v. Schaefer, 88 Ind. 92;

Jumeau v. Brooks, supra.

The statute and cases above cited establish the following rules:

"Under this section, pleadings must be liberally construed, with the aim to arrive at substantial justice, and it is no longer the rule that a pleading must be strongly construed against a pleader."

Isaacs v. Holland, supra.

"After verdict, where no motion has been made to make the pleadings more definite and certain, they will be liberally construed to sustain the judgment."

Johnson v. Leonard, supra.

"On appeal every presumption will be indulged in favor of the ruling of the court below in sustaining a pleading."

Evans v. Schaefer, supra.

"When testimony is received without objection, or motion to strike or suggestion of surprise, a non-suit is properly refused, and the complaint should be considered amended to correspond with the facts proven."

Murray v. Mead, supra.

The contention is made that the jurisdiction of the court depended upon the alienage of the defendant in error, and that such alienage does not sufficiently appear by the allegation "a resident of Washington and a citizen of Sweden," that the plaintiff should have been described in express words as "an alien," and the case of *Stuart v. City of Easton*, 15 Sup. Ct. 268, 156 U. S. 46, is relied upon. In that case this court holds that: "Where the jurisdiction of the United States Circuit Court depends upon the alienage of the plaintiff, that fact is not made to appear sufficiently to sustain such jurisdiction by describing him as a "citizen of London, England." Some of the lower courts have taken an erroneous view of this decision, and have held that where the jurisdiction of the court depends upon the alienage of one of the parties, he must be described by the word

"alien," and to describe him as a "citizen" of a foreign country is not sufficient. But this case does not so decide, as appears clearly from the cases cited in the opinion. The court bases its decision upon a number of former decisions of this court, each one holding that "citizen" is not synonymous with "resident," and where the statute requires that the parties be citizens of different states, it is not sufficient to describe one as residing in one state and the other as residing in another state. This doctrine is well established and based upon reason and the common use of the English language, for a resident of California does not by any means imply that a person is a citizen of California. and this is precisely the difficulty with the description "a citizen of London, England," for this means nothing more than a resident of London, England, and by no means implies that he is a British or foreign citizen.

Webster's International Dictionary defines the word citizen as follows:

Citizen: 2. An inhabitant of a city; a townsman.

3. A person, native or naturalized, of either sex who owes allegiance to a government and is entitled to reciprocal protection from it.

From the foregoing it clearly appears that an American citizen may be properly described as a "citizen of London, England," as such description only implies that he is a resident of London. But such criticism does not apply at all to the description in the case at bar, to-wit: "A resident of Washington and a citizen of Sweden," for the allegation that he is a resident of Washington

negatives any possible inference that the word citizen is used only in its limited sense as a dweller in a city, and shows positively that the word "citizen" as here used is in its political sense as a person owing allegiance to the government of Sweden.

Nor is it longer necessary to describe a foreign citizen as an alien. The act of March 3, 1891, defining the jurisdiction of the Circuit Court, uses this language:

"A controversy between citizens of a state and foreign, state, citizen or subject."

This statute supersedes the provisions of Rev. Stat. 629, relating to jurisdiction in civil suits, where an alien was a party, and it is no longer necessary to describe a party as an alien.

Hennesey v. Richardson Drug Co., 47 L. Ed. 697; 189 U. S. 24.

In this case the following rule is established:

"Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as all of Cognac in France, and citizens of the republic of France is sufficient without any averment of alienage to bring the suit within the provisions of 25 Stat. at L. 433, Chap. 866, conferring original jurisdiction upon the circuits courts of the United States of all suits in which there is a controversy between citizens of a state and foreign states, citizens, or subjects."

Sweden is a foreign state, and a citizen of Sweden is a foreign citizen. The court takes judicial notice of the existence of a foreign country.

"All civilized nations recognize each others existence as members of the great family of sovereignties, and gen-

eral public and external relations. The national flag and seal are the universal symbols of nationality and sovereignty. Every soverign power, therefore, recognizes, and its tribunals take notice of, the existence and titles of all the other sovereign powers, in the family of nations, their respective flags and seals of state."

12 Am. & Eng. Enc. of Law (1st Ed.), p. 152.

At the time this suit was brought the king of Sweden was also king of Norway, but at the time the jurisdiction of the court was questioned the king of Sweden was no longer king of Norway. But even during the union of Sweden and Norway under one king, each country was an independent soverign state; each had its own constitution, flag, seal of state, parliament and government, The countries were never known as the kingdom of Sweden and Norway, but as the kingdom of Sweden and the kingdom of Norway, each country being a free and independent kingdom, though ruled by the same king. No person was ever a citizen of Sweden and Norway, but was either a citizen of Sweden or a citizen of Norway, one being foreign to the other. A Swedish citizen had no rights, as such, in Norway, and vice versa. In 9 Century Dictionary and Encyclopaedia, p. 969, Sweden is described as follows:

"A kingdom of Europe in the eastern part of the Scandinavian peninsula. Capital, Stockholm. It is bounded by Norway on the west and north. * * * Sweden and Norway have been united under the same king since 1814, and are bound to stand by each other in war, but are otherwise free and independent."

"Sweden is a limited monarchy. Its constitution, like that of England, rests on historical development of

several centuries. The executive power is vested in the king alone, the legislative power he shares with the riksdag, both parties having the rights of initiative and veto."

"Sweden has been united with Norway since 1814. The union is regulated by the 'riksakt' of 1815, according to which each country is free and independent, though both are governed by the same king."

Vol. — Chambers Enc., p—

The constitution of Norway provides as follows:

"A. FORM OF GOVERNMENT AND RELIGION.

"The kingdom of Norway shall be a free, independent, indevisible and inalienable kingdom united with Sweden under one king. Its form of government shall be a limited monarchy."

C. CITIZENSHIP.

"50. The right of voting shall belong to every Norwegian citizen who has completed his 25th year, and has resided in the country for five years and is residing there."

(Constitution of Norway.)

The act of union between Sweden and Norway, known as the "riksakt," provides as follows:

"1. The kingdom of Norway shall be a free, independent, indivisible and inalienable kingdom united with Sweden under one king. Its form of government shall be a limited and hereditary monarchy."

It must then be conceded that Sweden is a foreign, sovereign state and not a part of a foreign state, and a citizen of Sweden is accordingly a foreign citizen.

Objection was made that the word "citizen" is only used in regard to the citizen of a republic, and that the expression "citizen of Sweden" is insufficient for the reason that Sweden is a limited monarchy, and that the word subject should have been used. This contention cannot be maintained without doing violence to the ordinary and common use of the English language.

The word "citizen" is defined by the authorities as follows:

"Citizen: In modern law a person who owes an indefeasable allegiance to a state or nation, and who is entitled to certain rights and privileges which appertain to freemen. This view prevailed at a date as early as the time of Bodin (A. D. 1576), who defines a citizen to be 'a free subject holding of the sovereignty of another man.'"

Vol. 11, Johnson's Universal Enc., p. 581.

"Citizen: 3. A person, native or naturalized, of either sex, who owes allegiance to a government and is entitled to reciprocal protection from it."

Webster's International Dictionary, p. ——

"A citizen is one who owes to a government allegiance, service and money by way of taxation, and to him the state in turn grants and guarantees liberty of person and of commerce, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security in person, estate and reputation."

3 Am. & Eng. Enc. of Law (1st Ed.), p. 242.

The authorities give the following definitions of the ward "subject":

"One who owes allegiance to a sovereign, and is governed by his laws. The natives of great Britain are subjects of the British government. The natives of the United States and naturalized foreigners, are subjects of the federal government. Men in free governments are subjects as well as citizens. As citizens they enjoy rights and franchises; as subjects the are bound to obey the law."

Webster's Dictionary, p. 1099.

"Subject: An individual member of a nation, who is subject to the laws. This term is used in contradistinction to a citizen, which is applied to the same individual when considering his political rights."

II. Bouvier's Law Dictionary, p. 551.

The word "citizen" is frequently applied to a member of a monarchy in the daily use of the English language, and often used by the United States court in decisions and opinions:

Robertson v. Scottish Union, 68 Fed. 176;

Jennis v. Loudes, 84 Fed. 74.

In both the foregoing cases the court uses the expression "citizen of Great Britain."

As will be seen from the foregoing, while the term "citizen" is used to designate a member of a republic it is not exclusively so, but is also appropriately used to designate a member of a monarchy provided he is a freeman.

It seems that after defendant had gone to trial without objection to this allegation it should now be construed so as to sustain the verdict, because the intention

of the pleader is apparent. It seems to us that to do otherwise would be to place technical perfection above substantial justice. The plaintiff is a Swedish immigrant; his only asset was his healthy body and ability to labor; he has been deprived of that asset through the negligence of defendant, so found by the jury and trial judge, defendant does not question the merits of plaintiff's cause, but has kept this cause going now for more than a year quibbling over the use of a single word.

It is recited in the questions certified to this court that motion to dismiss was urged, because plaintiff neither by pleadings nor proof had shown himself to be a citizen of any state, domestic or foreign.

An examination of defendant's answer will show that the allegation of plaintiff's complaint is not denied. The answer reads:

"Comes now the above named defendant, and for answer to the complaint of the plaintiff herein alleges:

"1.

"Referring to paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of said complaint, this *plaintiff* denies the same."

As will be seen from the foregoing, the word "plaintiff" is used instead of "defendant." It was defendant's place to deny and not plaintiff's and the result is that the allegations of the complaint are not denied.

If diverse citizenship is alleged, it is not put in issue by a general denial.

Adams v. Shirk 117 Fed. 801; 55 C. C. App. 25;

Collins v. City of Ashland, 112 Fed. 175.

But if the court holds that defendant's denial was sufficient and the burden of proof upon plaintiff, and that the recitals in the questions certified to this court are true and contains all of the proof on that point, then we say that the proof was sufficient. It is as follows:

"Q. Your nationality is what? A. Timberman. Q. What country are you from? A. From Sweden. Q. How long have you been in this country? A. Well, I have been in this country since May, 1903. Q. Since May, 1903? A. I came over from Sweden into Minnesota. Q. Were you in Seattle in August last? A. Yes, sir. * * * His features, speech and manners indicated that he was a Scandinavian."

The fact that he came from Sweden and had been in this country only two years, his manner of speech, his inability to understand English, and his appearance was sufficient proof to a jury that the plaintiff was a Swedish immigrant, and had not been here long enough to be naturalized.

Under the circumstances, considering that no objection was made until after verdict, and the liberal construction of pleadings under the law of the State of Washington, we submit that the allegations and proof of plaintiff's foreign citizenship were sufficient, and that the judgment of the Honorable Circuit Court should be affirmed.

Respectfully submitted,

WALTER S. FULTON and
MARTIN J. LUND,
Attorneys for Defendant in Error.

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No. 30.

In the Supreme Court of the United States

OCTOBER TERM, 1905

C. H. NICHOLS LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
CHARLES FRANSON,
Defendant in Error.

No. 281 30.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF OF DEFENDANT IN ERROR

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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1905

C. H. NICHOLS LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
CHARLES FRANSON,
Defendant in Error.
No. 281

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF OF DEFENDANT IN ERROR

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No. 281

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF OF DEFENDANT IN ERROR

Defendant in error having filed his printed brief in support of his motion to dismiss the writ of error and upon the merits, plaintiff in error filed its brief in answer, to which brief we submit the following in reply.

ON MOTION TO DISMISS THE WRIT OF ERROR.

Plaintiff in error contends that it is the duty of the court to decide the question of jurisdiction so as to enable either party to obtain a review of such decision. But it is not the court's duty to furnish the record for the appellate court. This case was tried to a jury and occupied two days. (Rec., pp. 6, 7.) The jurisdiction of the court

was one of the issues in the case submitted to the jury by the express instruction of the court. (Rec., pp. 8, 9.) The jury found the issue in favor of defendant in error. No exception was taken to the action of the court in submitting the issue to the jury, nor to the verdict of the jury upon that ground. What the testimony or evidence was before the jury and upon which the jury based its verdict is not shown by any bill of exceptions in this case and before this court. If the evidence before the jury established the citizenship of defendant in error it is sufficient and a defective allegation of citizenship is cured by the evidence.

Sun Print. & Pub. Co. v. Edwards, 194 U. S. 377, 48 L. Ed. 1029.

Plaintiff in error having taken no exception to the action of the court in submitting the issue to the jury, and having failed to preserve the evidence by proper bill of exceptions, the action of the trial court cannot be reviewed.

Bank v. Caldwell, 11 Sup. Ct. 162;
Kearney v. Denn, 82 U. S. 51, 21 L. Ed. 41.

And it is not the duty of the trial court nor of the adverse party to preserve the record by means of a bill of exceptions, but it is the duty of the party claiming the error and seeking the review.

Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055.

The record before this court recites that, after verdict plaintiff in error moved to dismiss the action for the reason that defendant in error neither by pleading nor *proof* had shown himself to be a citizen or subject of any state (Rec., p. 8), and that the question of the citizenship of defendant in error was submitted to the jury. (Rec., pp. 8, 9.) But the evidence which went to the jury is not before this court for want of a bill of exceptions.

In the case of *Kearney v. Denn, supra*, this court, in passing upon a similar state of facts, says:

"On that day the plaintiffs in error appeared by their counsel and filed a motion in writing to dismiss the case, for the reason that Mary Kearney was at the commencement of the suit and had been ever since a resident and citizen of the District of Columbia and that J. L. Henry and Kate Kearney Henry, his wife, had been during the same period, citizens and residents of the state of Maryland, and that the court had, therefore, no jurisdiction to hear and decide the cause. The court overruled the motion, but upon what ground does not appear. It is noted on the record that the plaintiffs in error 'reserve their exception to the decision of the court.' This is all the record contains touching the motion. For aught that appears to the contrary, the court may have overruled it, because the facts of the residence of the defendants as stated in the motion were not proved, or because it was proved that they resided in a state or states other than Maryland. Error must be shown. It is never presumed. We cannot take cognizance of the exceptions reserved upon the record, any more than we could of an exception noted in like manner to the admission of improper testimony or misdirection by the judge to the jury, in the trial of a cause. In order to bring the facts properly before us a bill of exception, setting forth what was proved and

the decision of the court should have been taken. As the record stands we cannot examine the subject."

There are then no facts before this court upon which the action of the trial court in refusing to dismiss the case can be reviewed unless the recitals in the question certified to this court is to be taken as a sufficient bill of exceptions. Ex parte proceedings cannot be substituted for a bill of exceptions. The fact that the question certified to this court was prepared by plaintiff in error and submitted to the court ex parte without notice to defendant in error is sufficient to prevent the recitals therein from being taken instead of a bill of exceptions. If such recitals are to be taken instead of a bill of exceptions, then the fact that defendant in error had no notice of the signing of the same and no opportunity to propose amendments, is sufficient to strike the same from the record and to prevent this court from considering the alleged error. The fact that no service of the proposed certificate was made upon defendant in error appears in the record from the fact that no notice, proof of service or acceptance of service is shown.

A certificate of questions upon jurisdiction cannot take the place of a bill of exceptions.

Felix v. Schnarnweber, 125 U. S. 54, 8 Sup. Ct. 759.

But if the certificate in the record is to be taken instead of a bill of exceptions, then we move the court to

strike it from the record for the reason that plaintiff in error was given no notice of its signing and certification, and was given no opportunity to propose amendments to the same, and we respectfully ask that this motion be included in our original motion to dismiss the writ of error.

ON THE MERITS.

The contention of plaintiff in error to the effect that the allegation and evidence were insufficient to establish the citizenship of the defendant in error is based upon a wrong construction of the decision of this court in the case of *Stuart v. Easton*, 156 U. S. 46.

Plaintiff in error makes this statement in its brief (p. 6):

"In *Stuart v. Easton*, 156 U. S. 46, an allegation that one of the parties was 'a citizen of London, England,' was held insufficient to confer jurisdiction *for the reason that Great Britain being under a monarchial form of government had only 'subjects' and no 'citizens.'*" (The italics are ours.)

This is a clear misapprehension of this decision. This court has never held, in that case nor in any other case, that there are no citizens under a monarchial form of government. To so hold would be a clear violation of

the ordinary use and understanding of the English language.

Webster's International Dictionary, Citizen;

Vol. II *Johnson's Universal Enc.*, p. 581;

II *Bouvier's Law Dictionary*, p. 551;

Webster's Dictionary, p. 1099.

The opinion in *Stuart v. Easton* is very brief, and is as follows:

"Plaintiff in error is described throughout the record as a 'citizen of London, England,' and the defendants as 'a corporation of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of the plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed at the cost of plaintiff in error, and the cause be remanded to the circuit court with leave to apply for amendments and for further proceedings. *Bingham v. Cabot*, 3 U. S. 3 Dall. 382 (1:646); *Mossman v. Higginson*, 4 U. S. 4 Dall. 12 (1:720); *Capron v. Van Noorden*, 6 U. S. 2 Cranch. 126 (2:229); *Jackson v. Twentyman*, 27 U. S. 2 Pet. 136 (7:374); *Connolly v. Tailor*, 27 U. S. 2 Pet. 556 (7:518); *Brown v. Keen*, 33 U. S. 8 Pet. 115 (8:886); *Robertson v. Cease*, 97 U. S. 646 (24:1056); *Bors v. Preston*, 111 U. S. 252, 263 (28:419, 422); *Denny v. Pironi*, 141 U. S. 121 (35:657); *Horn v. George H. Hammond Co.*, ante., p. 197."

The foregoing is the decision in full, and it nowhere holds that, "Great Britain, being under a monarchial form of government has only subjects and no citizens," as claimed by plaintiff in error. An examination of the cases cited as the basis of the decision explains the same.

Bingham v. Cabot holds that a description of one party as a "resident of Boston" and the other as a "resident of Philadelphia" is insufficient. The other cases cited are to the same effect. Residence is not synonymous with citizenship. *Denny v. Pironi* holds that it is insufficient to describe one party as a resident of California and the other as a citizen of Texas. From the foregoing it appears conclusively that the words "citizen of London, England" are taken by the court in their primary sense as a townsman or a dweller in a city and to mean only a resident of London, England. For if it held that there are no citizens in a monarchy, and for that reason the description was insufficient, why cite all these cases which hold that it is insufficient to describe a party as a resident of a certain place?

But if this opinion is authority for the claim that a foreign citizen must be described as an "alien," then that is no longer necessary, for the statute has been repealed.

Hennessey v. Richardson, 189 U. S. 24, 47 L. Ed. 697.

In the case at bar the allegation of citizenship in the complaint is as follows: "That the plaintiff now is, and for more than one year last past has been a resident of the state of Washington, and a citizen of Sweden." (Rec., p. 1.) If the recitals of the evidence contained in the questions certified to this court are taken to be correct

and as containing all the evidence in the case on that point, then the proof in support of this allegation is as follows: "Q. Your nationality is what? A. Timber man. Q. What country are you from? A. From Sweden. Q. How long have you been in this country? A. Well, I have been in this country since May, 1903. Q. Since May, 1903? A. I came over from Sweden into Minnesota. Q. Were you in Seattle last August? A. Yes, sir." (Rec., p. 8.)

The court will observe, he is not asked what country he came from, but he is asked: "What country *are* you from?" and he answers: "*From* Sweden." That is: He *is* from Sweden,, *belongs* to Sweden. He is asked: "How long have you been in this country?" and he said: "Since May, 1903." That is seventeen months at the time of the commencement of the suit. He had not been here before, for he said he has been here only since May, 1903. This action was commenced Oct. 3d, 1904. (Rec., p. 4.)

Plaintiff in error is a citizen of the state of Wisconsin. Unless defendant in error was also a citizen of Wisconsin, the jurisdiction of the United States attached. From the testimony of defendant in error above quoted it positively appears that he could not be a citizen of Wisconsin for he had been in the United States only seventeen months and he must therefore be an alien, and it is immaterial what foreign country he was a citizen or sub-

ject of. But if he can be held to have been a citizen of the United States, then by virtue of the 14th amendment, he was a citizen of the state of Washington, for he was a resident of this state and had resided here since August preceding.

In *Sun Print. & Pub. Co. v. Edwards, supra,* this court says:

"Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a 'resident of the state of Delaware,' as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, and a negative answer would have been impelled by prior decisions. * * *

"But the whole record, however, may be looked to for the purpose of curing a defective averment of citizenship, where jurisdiction in a federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere in the record, or facts are therein stated, which in legal intendment constitute such allegation that is sufficient. * * *

"In the first place it" (the evidence) "shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium was legally domiciled in Delaware. Next, it demonstrates that he had no intention to abandon such domicile, for he testified under oath as follows: 'One of the reasons I left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware.' Now it is elementary that, to effect a change of one's legal domicile, two things are indispensible: First, residence in a new domicile; and, second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere ab-

sence from a fixed home, however long continued, cannot work the change. * * *

"As Delaware must then be held to be the legal domicile of Edwards at the time he commenced this action, had it appeared that he was a citizen of the United States, it would have resulted, by operation of the 14th amendment, that Edwards was a citizen of the state of Delaware. *Anderson v. Watt*, 138 U. S. 702, 34 L. Ed. 1081, 11 Sup. Ct. Rep. 449. Be this as it may, however, Delaware being the legal residence of Edwards, it was impossible for him to have been a citizen of another state, district or territory, and he must then have been either a citizen of Delaware or a citizen or subject of a foreign state. In either of these contingencies, the circuit court would have had jurisdiction over the controversy. But in the light of the testimony, we are satisfied that the averment in the complaint that Edwards was a resident 'of' the state of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring that plaintiff was a citizen of the state of Delaware. *Jones v. Andrews*, 10 Wall. 331, 19 L. Ed. 936; *United States Exp. Co. v. Kountze*, 8 Wall. 342, 19 L. Ed. 457."

By reason of the foregoing, we earnestly submit, that the allegation in the complaint "that the plaintiff now is and for more than one year last past has been a resident of the state of Washington, and a citizen of Sweden" together with the proof recited that he *is* from Sweden, that he had been in the United States only seventeen months at the time the suit was brought, and that he resides in Washington, and has resided there since August, 1904, conclusively shows that the court had jurisdiction of the controversy; particularly so when no objection was made until after verdict, and we submit that the question

certified to this court, as to whether the motion to dismiss should have been granted, should be answered in the negative. No objection to the jurisdiction was made until after verdict and subdivision (a) and (b) of the question is therefore immaterial.

Paragraph 4931, Ballinger's Code of Washington, reads as follows:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Respectfully submitted,

WALTER S. FULTON,
MARTIN LUND,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 30.—October Term, 1906.

C. H. Nichols Lumber Company, Plaintiff in Error, *vs.* Charles Franson.	In error to the Circuit Court of the United States for the Western District of Washington.

[December 3, 1906.]

Mr. Justice White delivered the opinion of the Court.

A motion has been made to dismiss the writ of error, among others, on the ground of the absence of a bill of exceptions and the character of the order appealed from. We pass to the merits of the case without stopping to review the grounds of the motion, as we think they will be substantially disposed of by the views which we shall hereafter express.

By this writ of error the C. H. Nichols Lumber Company seeks the reversal of a judgment obtained by Charles Franson in the Circuit Court of the United States for the Western District of Washington. Considering the record alone, and putting out of view for the moment the effect of statements contained in a certificate made by the court below on the allowance of the writ of error, the case is this: The action was brought to recover for personal injuries alleged to have been sustained while in the employ of the defendant. The jurisdiction of the court below was invoked solely upon the ground of diversity of citizenship, it being alleged in the first paragraph of the complaint that the defendant was a corporation organized under the laws of the State of Washington, and doing business in the State of Washington, and that the plaintiff was at the time of the filing of the complaint and had been for more than a year prior thereto "a resident of Washington and a citizen of Sweden." Admitting its incorporation, and that it was doing business in the State of Washington, the defendant, by its answer, specifically denied each and every other allegation of the first as well as other specified paragraphs of the complaint.

The cause was tried to a jury, and, after verdict and remittitur of a portion thereof, a judgment was entered in favor of plaintiff. The record does not contain a bill of exceptions, and in the brief of counsel for plaintiff in error it is stated that none was prepared.

This writ of error, upon the ground solely of a want of jurisdiction in the trial court, was prayed and allowed, and a formal certificate was made by

the judge, reciting to the time when and how the question of jurisdiction was raised and decided, accompanied with a statement of the pleadings and of the court's impression of certain testimony given at the trial by the plaintiff, deemed by the court pertinent to the elucidation of the question of jurisdiction. The certificate concludes with the statement of enumerated "questions of jurisdiction," which the court was of opinion arose for decision, all of them being based upon the overruling by the court of a motion to dismiss the action for want of jurisdiction, which motion, it is recited in the certificate, was made between verdict and judgment. And the only ground here assigned as error is predicated upon the action of the court in denying such motion to dismiss.

As the Circuit Court was without power to make a certificate containing a statement of facts as the basis for legal propositions upon which it desired the guidance of this court, (*Mexican Central Ry. Co.* v. *Eckman*, 187 U. S. 432; *United States* v. *Rider*, 163 U. S. 132,) it follows, speaking in a general sense, that our right to review on a direct proceeding concerning the jurisdiction of that court must depend upon the record and not upon the mere statement of facts made in the certificate prepared by the trial court. Applying this general rule, as it nowhere appears from the record that the issue as to jurisdiction presented by the motion to dismiss, the overruling of which is the sole ground for reversal relied upon in the assignment of error, was made or passed upon by the court, we should be constrained to dismiss this writ of error on the ground that the record did not disclose the presence in the case of the question of jurisdiction which is made the basis of the assignment of error. As, however, under the Judiciary Act of 1891, on a direct review of a question of jurisdiction, the trial judge is authorized to certify as to the existence of such question, we think we may look at his certificate for the purpose of ascertaining when and how the question of jurisdiction was raised, although, for the purpose of deciding the question shown to have been thus raised, we may not resort to the statements in the certificate for the purpose of supplying elements of decision which we could not properly consider in an action at law without a bill of exceptions. We have said that we may resort to the certificate, in the absence of a proper showing on the record as to when and how the question of jurisdiction was raised and decided, for the limited purpose stated, because the power to do so is implied in a previous decision of the court, (*North American &c. Co* v. *Morrison*, 178 U. S. 262,) and because of the general rule that it would be our duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action. (*Thomas* v. *Ohio State University Trustees*, 198 U. S. 211.) It is apparent under the rule we have stated that, whilst we must consider the record for the purpose of determining the question of jurisdiction which the certificate shows adequately

to have been raised, we may not consider, in passing upon that question, in the absence of a bill of exceptions, the extraneous matter, such as the testimony of the plaintiff, etc., which forms no part of the record. The question, therefore, for decision under these circumstances is merely this, Does the record shows jurisdiction in the court below? This solely depends upon the contention that the allegation in the complaint of the alienage of the plaintiff was insufficient.

The allegation was as follows: "That the plaintiff now is and for more than one year last past has been a resident of Washington and a citizen of Sweden." In brief, the argument is that at the time the action was brought Sweden was under a monarchical form of government, being, jointly with Norway, under the rule of the King of Sweden and Norway, and if the plaintiff owed allegiance to the government of Sweden he was not a "citizen" but a "subject" of that country. It is not, however, disputed that, although at the time of the bringing of this action Sweden, a limited monarchy, was united to Norway under the same king, and the two countries were bound to assist each other in the event of war, they were otherwise free and independent. (9 Century Dictionary and Encyclopedia, 969.) The allegation that the plaintiff was a resident of the State of Washington clearly shows that the designation citizen of Sweden was not employed to indicate mere residence, and could only have been intended as a statement of the nationality of the plaintiff, the country to which he bore allegiance. Whether, as contended for the defendant in error, the plaintiff, if he owed allegiance to the ruler of the kingdom of Sweden, was properly described, in the strictest technical sense as a citizen instead of as a subject of Sweden, we need not consider. The meaning of the pleader being evident, the objection is without merit. (*Hennessy* v. *Richardson Drug Co.*, 189 U. S. 24.)

Whilst we hold that in a case of direct review under the Judiciary Act of 1891, when the record does not otherwise show when and how the question of jurisdiction was raised, the certificate of the Circuit Court may be considered for the purpose of supplying such deficiency when the elements necessary to decide the question are in the record, we deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon and the elements upon which the decision of the question was based.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.